

STATE OF CALIFORNIA

JOINT LEGISLATIVE COMMITTEE FOR
REVISION OF THE PENAL CODE

Tentative Draft No. 2

SUBJECTS COVERED:

- Division 3. Disposition of Offenders
 - Division 4. General Principles of Liability
 - Division 5. Exemptions and Defenses
 - Division 7. Specific Offenses
 - Division 10. Crimes Against Life and Security of Person
 - Division 11. Crimes Against Sexual Morality, Public Decency and the Family
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Joint Legislative Committee for the Revision of the Penal Code
Project Office: School of Law (Boalt Hall)
University of California, Berkeley

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INTRODUCTION

This is the second series of tentative drafts prepared by the research and drafting staff of the Penal Code Revision Project for submission to the Joint Legislative Committee for Revision of the Penal Code. The recommendations which it contains are tentative and subject to modification. They have not been acted upon by the Joint Committee and their publication does not imply endorsement or approval of any of its members.

The purpose of publication in tentative form at this time is to acquaint the public and those concerned in the administration of criminal justice with the work of criminal law revision in California. The project was authorized during the 1963 general session of the legislature.* The Joint Committee was established at that time and charged with the duty of making a comprehensive and thoroughgoing study of California's criminal law and criminal procedure. After a survey of similar projects elsewhere in the United States, the Committee recruited its revision staff in 1964 and directed it to prepare recommendations in accord with the Committee's general charge to revise and simplify the criminal law of California.

The work of revision is now well under way. It has as its objective the formulation of a code of criminal law, a code of criminal procedure and a corrections code. The drafts contained in this report are indicative of the general style and approach of the revision staff in the substantive criminal law area. Work is going forward concurrently on a corrections code; the draft of a procedural code will await their completion.

Comment, suggestion and criticism of the tentative draft proposals are welcome and will receive the interested attention of the Joint Legislative Committee and its staff. Communications should be sent to the California Penal Code Revision Project, School of Law (Boalt Hall), University of California, Berkeley, California 94720.

ARTHUR H. SHERRY
Project Director

EXPLANATORY NOTE: Some portions of some of the drafts are enclosed in brackets. Whenever this is done the bracketed text is provisional and subject to further staff modification or it is offered as an alternative proposal.

Where references are made to proposed sections which have not yet been drafted and numbered, the symbols XX appear in place of section numbers.

*Chap. 1797, Stats. 1963.

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DIVISION 3. DISPOSITION OF OFFENDERSChapter 1. Classification of Offenses;
Degrees of Felonies.

Section 200. Offense

An offense is conduct which is prohibited by the Constitution, this code or any other statute or ordinance of this state and which is made punishable [by death or] by imprisonment or by fine.

Section 201. Crime: Felony, Misdemeanor,
Petty Misdemeanor

A crime is an offense which is punishable [by death or] by imprisonment. A crime is a felony, a misdemeanor or a petty misdemeanor.

(a) It is a felony if it is punishable [by death or] by imprisonment for a term in excess of one year, unless the crime in a particular case is declared by a court to be a misdemeanor pursuant to Section XX of this code.

(b) It is a misdemeanor if it is punishable by imprisonment for a term in excess of [30] days but not in excess of one year, or if, in a particular case, it is so declared by a court pursuant to Section XX of this code.

(c) It is a petty misdemeanor if it is punishable by imprisonment for a term not in excess of [30] days.

Section 202. Infraction

An infraction is an offense which is punishable by fine, but not [by death or] by imprisonment. An infraction does not constitute a crime and conviction therefor shall not give rise to any legal disability or disadvantage based on conviction for a crime. For all procedural purposes infractions shall be treated as misdemeanors, unless otherwise specified.

COMMENT

Sections 200, 201, 202

These three sections have their counterparts in Sections 15, 16 and 17 of the present Penal Code. They make no

significant changes in present law, although they do lay the groundwork for important changes proposed in other sections.

The function of these sections is to define and classify various kinds of violations of the criminal law. Section 200 uses the term "offense" for the most general kind of unlawful conduct and defines it, as does the present law, in terms of its prohibition by the Constitution, this code or other enacted statute or ordinance and its punishability by death, imprisonment or fine. Of course, this does not affect any law which provides for other consequences of conviction. It simply makes it of the essence of an offense that it may be punished in the ways described. The chief effect of this section, like that of the present Section 15, is to eliminate common law crimes. Offenses are divided into two kinds, crimes and infractions. Crimes are further classified in Section 201; infractions are dealt with in Section 202.

The proposal to create a class of unlawful conduct known as an infraction, distinct from crimes proper, is new to California law. The essential distinction between an infraction and a crime is that an infraction is punishable by fine but not by imprisonment, and conviction for an infraction may not, under the express terms of Section 202, give rise to any legal disadvantage attendant upon conviction of a crime. (Again it should be noted that this definition does not exclude from the category of infractions offenses which are made punishable by such civil penalties as forfeiture or license revocation in addition to a fine.) The case for such a class of offense was well put in the commentary to the Model Penal Code (*Tentative Draft No. 2*, pp. 8, 9): "There is, however, need for a public sanction calculated to secure enforcement in situations where it would be impolitic or unjust to condemn the conduct involved as criminal. In our view, the proper way to satisfy that need is to use a category of non-criminal offense, for which the sentence authorized upon conviction does not exceed a fine . . . This plan, it is believed, will serve the legitimate needs of enforcement, without diluting the concept of crime or authorizing the abusive use of sanctions of imprisonment. It should, moreover, prove of great assistance in dealing with the problem of strict liability, a phenomenon of such pervasive scope in modern regulatory legisla-

tion. Abrogation of such liability may be impolitic but authorization of a sentence of imprisonment when the defendant, by hypothesis, has acted without fault seems wholly indefensible. Reducing strict liability offenses to the grade of violations may, therefore, be the right solution." It should also be noted that the category of an infraction provides a useful and appropriate classification for the mass of minor traffic offenses which at present are treated as crimes. See Judicial Council of California, Recommendation and Study on A System for Classifying Minor Traffic Violations as Noncriminal Traffic Infractions, Tentative Draft, May 1966.

The last sentence of Section 202 on infractions is made necessary by the fact that the provisions of the California law dealing with procedural matters (specifically those dealing with powers of arrest, pretrial and trial procedures) are geared to felonies and misdemeanors. Until some special procedural provisions are made for infractions the effect of this sentence is to make the misdemeanor provisions applicable to infractions.

Crimes are defined in Section 201 as offenses punishable by death or imprisonment and are divided into felonies, misdemeanors and petty misdemeanors. The petty misdemeanor is new in California law. Its inclusion reflects a judgment that some basis for differentiation is required of the great range of criminal conduct, varying from trivial offenses to relatively serious ones, now indiscriminately grouped as misdemeanors. Petty misdemeanors are tentatively defined as crimes punishable by not more than thirty days of imprisonment. Final judgment on this must await formulation of the provisions governing misdemeanor sentences generally. The remainder of Section 201 is substantially similar to present law, with the exception that duration of imprisonment (in excess of a year) rather than place of imprisonment (state prison) is employed to distinguish a felony from a misdemeanor following the practice in the great majority of states. Duration of imprisonment was thought a more appropriate criterion than place as an indication of the relative seriousness of crime. Moreover, there is reason to anticipate developments which will alter existing responsibilities for incarceration facilities, with the state, for example, assuming responsibility for what are now local facilities. These changes could be im-

plemented with least disturbance of the code's structure if duration of imprisonment were used as the criterion.

Paragraphs (a) and (b) of Section 201 also provide for the cases in which, pursuant to a designated section yet to be drafted, the court is authorized, much as it is under present law, to downgrade a felony to a misdemeanor. Where it does so the nature of the crime will be that which it designates.

Use of the criterion of punishability in excess of a year should serve to resolve some of the problems in classifying crimes defined in statutes other than this code which are sometimes ambiguously treated. Regardless of how the statute denominates the crime, whether as a felony or misdemeanor (or infraction) its classification will be determined by the punishment authorized. Where no punishment is explicitly authorized, as where the statute states only that the defined conduct shall be criminal, or that it shall be a felony or a misdemeanor, subsequent sections of this code, by specifying the duration of punishability in these cases, will determine the issue of classification.

Section 203. Degrees of Felonies

(1) For the purpose of sentence, felonies are classified as:

- (a) felonies of the first degree;
- (b) felonies of the second degree;
- (c) felonies of the third degree.

(2) The degree of any felony defined in this code which is unspecified shall be of the third degree.

(3) Notwithstanding any other provision of law, any crime designated as a felony or made punishable by imprisonment for a term in excess of one year by the Constitution or any statute of this state other than this code is a felony of the third degree and shall be punishable as such.

COMMENT

Section 203. Degrees of Felonies

This section, which is patterned after the proposal of the Model Penal Code, is directed at ending the proliferation of distinct punishments for each felony by substituting a scheme under which all felonies for punishment purposes

are consolidated into a limited number of categories. New York has recently done the same.

In reviewing the Penal Code and other statutes of California we have found a surprising variety of punishments authorized for felonies. This has been the product of piecemeal attention to the problem of punishment as particular crimes came under legislative scrutiny. There are presently in effect in California seven different minimum terms of imprisonment and eleven maximum terms of imprisonment. The various minima and maxima combine into approximately forty-five different prison terms for felony first offenders. As has been frequently pointed out since the Model Penal Code turned its attention to this kind of problem (and most recently by the Report of the National Crime Commission), so large a number of statutory distinctions among felony offenses is greatly in excess of those which a legislature could rationally draw on the basis of such factors as the harmfulness of the conduct and the consequent importance of deterring it, the future dangerousness of the defendant, and the expected public demand for sanctions. So large a number of legislative punishment distinctions is particularly pointless in California which in any event vests the major decisions as to parole and discharge in an administrative agency, the Adult Authority, under the California indeterminate sentencing law.

An additional defect in the present system is that it has produced numerous provisions which seem to have been passed without any reference to the sentencing provisions applicable to other offenses, with the result that the punishment for many crimes is grossly out of proportion to that for offenses of similar gravity. To cite just a few examples, the code provides a maximum sentence of life imprisonment for sodomy (*Section 286, 671*), while the maximum sentence for oral sex perversion between consenting adults is fifteen years (*Section 288a*). The maximum sentence for attempted murder generally is twenty years (*Section 664*), yet a specific provision for an attempt to murder by poison carries a minimum term of ten years and a maximum term of life imprisonment (*Sections 216, 671*). The maximum sentence for an assault with intent to commit murder is fourteen years (*Section 217*), while an assault with intent to commit rape, robbery, grand larceny, sodomy or mayhem carries a maximum sentence of twenty years. A legis-